

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TIMOTHY W. KELLER

Claimant

VS.

WAL-MART

Respondent

AND

AMERICAN HOME ASSURANCE CO.

Insurance Carrier

Docket No. 1,023,972

ORDER

Claimant requests review of the October 27, 2005, preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore.

ISSUES

The Administrative Law Judge (ALJ) found that claimant failed to sustain his burden of proof of injury by accident arising out of and in the course of his employment. The ALJ also found that claimant failed to establish that he is temporarily totally disabled or that his need for medical care is attributable to his employment with respondent. The ALJ stated that he had concerns about claimant's credibility and that claimant was deliberately vague about the manual labor he performed outside of his employment with respondent.

The claimant argues that he suffered repetitive injuries to his right and left elbows as a result of his work stocking shelves for respondent and requests that the ALJ's preliminary hearing Order be reversed.

Respondent argues the ALJ's findings should be affirmed in all respects. In addition, respondent contends notice was not given to respondent until June 6, 2005, more than ten days after claimant's last date of physical work for respondent, May 19, 2005. Claimant asserts that since the ALJ did not rule on the issue of timely statutory notice, it is not properly before the Board to decide.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant began working for respondent in March 2004. His job required him to stock shelves in the grocery department from 10 p.m. until 7 a.m. Claimant's last day of physical work for respondent was May 19, 2005. Claimant was called the next day and told he was being put on administrative leave. On May 27, 2005, claimant was terminated for reasons unrelated to his job performance.

Claimant described his job as unloading trucks and stocking shelves. He began having problems with his elbows and hands. The problems started slowly and progressed. He testified that the pain became worse and stayed longer. He testified that he thought that by Christmas 2004 or New Year's 2005, the pain became regular and daily. He testified that the nights he worked cereal aisles were the worst because the boxes needed to be torn open by hand. Overhead work also bothered him.

Claimant stated that he did not seek medical treatment or turn in a claim because bonuses at respondent were determined by how much money went out of the store for injuries or damages and he did not want to be the reason employees did not get a bonus. However, he testified he did tell a coworker, Keith Danser, on multiple occasions about the pain in his elbows. He testified he also told a supervisor, PA, but said that PA just shrugged it off. After his termination, on June 6, 2005, he called Joshua Anderson, the store manager, and told him about the problems with his elbows and asked if respondent would pay to let him see a doctor. He testified he made the call because he was afraid he would be unable to find another job with the pain he was having. He admitted he did not give anything in written form to respondent to the effect that he wanted workers compensation benefits.

Claimant testified that during the period of time he worked for respondent, he also did odd jobs for a man who owned rental properties. He testified that he did siding, electrical and plumbing work, as well as painting. He said this work was off-and-on work and he worked approximately 13 hours a week doing odd jobs.

Claimant first sought medical treatment on June 13, 2005, when he was seen at Prairie Star Health Clinic (Prairie Star). He gave a history of

complaint of both elbows being painful, stiff, losing grip strength, and having numbness and tingling down the hands. He has noticed it for the past 3 months. He predominantly noticed it after he started work as a stocker at Wal-Mart, in which he stocks shelves and doing lifting, a lot of repetitive motion with his hands. He states over the course of 3 months it has progressively gotten worse to the point where he has lost strength in his hand and unable to open things. He states his

arms wake him up at night, very painful. States they are about the same throughout the day, not worse in the morning or evening.¹

Claimant returned to Prairie Star in July 28, 2005, complaining of back pain. He testified that he was told he had a back spasm, and the spasm cleared up the next day. The spasm was unrelated to his work with respondent.

Claimant testified that sometime in July 2005, he began working for Electrex as a wire braider. He said he worked at this job for about four months.

Keith Danser testified that he and claimant were coworkers and worked the same shift at respondent. Mr. Danser testified that he and claimant would take smoking breaks together. He also stated that at times he had supervisory responsibilities over claimant. Mr. Danser testified that claimant never reported any injuries to him, although on a couple of occasions he complained of his elbows hurting, as well as other aches and pains. Claimant did not relate these injuries to his work. Mr. Danser testified that during one of these conversations, he asked claimant why he did not report the problems with his elbows and claimant just shrugged it off. Mr. Danser testified that claimant's job at respondent was a strenuous job. Mr. Danser also testified that he worked with claimant outside their employment with respondent doing odd jobs.

Joshua Anderson, respondent's store manager, testified that he had no memory of talking with claimant on June 6, 2005, about claimant's claimed work-related injuries. Neither did he have any written record of having a conversation with claimant after claimant's termination.

Paul Allen testified that he was claimant's supervisor during the duration of claimant's employment with respondent. He testified he first became aware of claimant's workers compensation claim about two weeks before his deposition was taken. He testified that claimant made no report to him of any kind of accident or injury involving his upper extremities. He stated that up until claimant was terminated, claimant was physically able to perform all his work activities.

Claimant's testimony that he suffered repetitive use injuries to his bilateral upper extremities during his employment with respondent is consistent with the type of work he performed for respondent. It is also supported by the testimony of Keith Danser, by the call claimant made to Joshua Anderson on June 6, 2005, and by the history claimant gave to the nurse practitioner when he first sought medical treatment on June 13, 2005. Other than Mr. Anderson's inability to recall having a telephone conversation where claimant requested medical treatment for a work-related condition, claimant's testimony is essentially uncontradicted. The fact that claimant called Mr. Anderson on June 6 is further

¹ P.H. Trans., Cl. Ex. 2 at 2.

supported by claimant's testimony that he was directed to make that call by his attorney and that his Application for Hearing is dated June 6, 2005. The Board finds claimant suffered personal injuries by a series of accidents arising out of and in the course of his employment with respondent.

The ALJ also found that claimant failed to prove that his present need for medical treatment is attributable to his employment with respondent as opposed to being due to his subsequent job with Electrex or claimant's part-time job doing remodeling work. Claimant testified that he started at Electrex about six weeks after he was terminated by respondent, so he had not started working there when he called Mr. Anderson seeking authorized medical treatment nor when he started treating with Dr. Phillips at Prairie Star. It is not clear how much remodeling work claimant was doing during that time period in late May and early June 2005. Claimant denies that his remodeling work and job with Electrex aggravated his condition, but claimant admits he quit the job with Electrex because he "couldn't stand the physical work. It required pulling wire harnesses up through a machine, and I had to rest my elbows on a pad to do that and I couldn't handle the pain."²

The Board finds that claimant's need for treatment in June 2005 was directly attributable to his work activities with respondent. But, based upon the record as it currently exists, the Board is unable to conclude that claimant's condition was not aggravated by his subsequent work activities. Accordingly, the Board affirms the ALJ's denial of benefits.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Bruce E. Moore dated October 27, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December, 2005.

BOARD MEMBER

c: James S. Oswalt, Attorney for Claimant
Kendall R. Cunningham, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

²P.H. Trans. at 20-21.